C. v. COMPTROLLER OF INCOME TAX

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Buttrose J.) May 31, 1967]

[Singapore — Federal Court Civil Appeal No. Y. 27 of 1967]

Income Tax — Excess payment — Claim for refund — Refusal by comptroller — Whether mandamus will lie against comptroller — Duty of court to interfere when comptroller acts ultra vires — Income Tax Ordinance (Cap. 166), ss. 79, 86 & 93.

The comptroller assessed tax payable by the taxpayer at $7,729.08. The taxpayer appealed to the Income Tax Board of Review but paid the total amount of the tax as he was required to do under section 86 of the Income Tax Ordinance. The board allowed the appeal, and by virtue of the board's decision the comptroller had received from the taxpayer an overpayment of $5,573.47. The taxpayer requested for the refund of that amount, but instead of refunding the excess payment, the comptroller chose to impose a condition precedent to his refunding, namely an undertaking by the taxpayer's solicitors to retain the refund in their client's account until the outcome of his appeal. As the comptroller refused to make payment to the taxpayer in accordance with section 93 of the Ordinance, the taxpayer proceeded by way of motion for an order of *mandamus* to compel the comptroller to comply with section 93(3). In the court below the motion was dismissed. On appeal,

Held: (1) the comptroller had no legal right or authority to require an undertaking by the taxpayer's solicitors to retain the refund in their client's account until the outcome of his appeal;

(2) *mandamus* will lie against the comptroller if he is under a statutory obligation to perform a duty towards the taxpayer. In the circumstances of this case there was such a duty imposed upon the comptroller and *mandamus* was the only effective and expeditious remedy open to the taxpayer — therefore an order of *mandamus* should issue directed to the comptroller compelling him to comply with the provisions of section 93(3) of the Ordinance by causing repayment to be made to the taxpayer of the sum of $5,573.45 being income tax paid by the taxpayer in excess of the amount payable by him.

Per Buttrose J.: "The comptroller has been entrusted by the Legislature with wide and far reaching powers, no doubt with very good reason, but it is of paramount importance that they should be exercised with circumspection and within the limits prescribed. If there has been an abuse of these powers it is the duty of the court to interfere and to ensure a strict and proper compliance with the provisions of the Ordinance".

Cases referred to:—

(1) *Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.* (1928), 42 C.L.R. 39.

(2) *Commissioner of Income Tax, Bombay Presidency & Aden* v. *Bombay Trust Corporation Ltd.* (1936), 4 I.T.R. 323; A.I.R. 1936 P.C. 269; 63 I.A. 408; 164 I.C. 18; 39 Bom. L.R. 18.

FEDERAL COURT.

Graham Hill for the appellant.

Amarjit Singh Verick (Assistant Comptroller of Income Tax) for the respondent.

Buttrose J.: This was an appeal from a decision of Ambrose J. dismissing a motion for an order of *mandamus* directed to the Comptroller of Income Tax, Singapore, (hereinafter referred to as 'the comptroller') compelling him to comply with the provisions of section 93(3) of the Income Tax Ordinance (hereinafter referred to as 'the Ordinance') by causing repayment to be made to one C. (hereinafter referred to as 'the taxpayer') of the sum of $5,573.47 being income tax paid by the taxpayer in excess of the amount payable by him under the provisions of the Ordinance.

At the conclusion of the hearing we allowed the appeal and made an order of *mandamus* compelling the comptroller to comply with the provisions of section 93(3) of the Ordinance as set out above but since the matter raised a point of some practical interest and importance to taxpayers generally we intimated we would give our reasons in writing at a later date. I now proceed to do so.

The facts and circumstances which gave rise to these proceedings are these.

By notices of assessment and additional assessment issued under the provisions of the Ordinance by the comptroller for the year of assessment 1965 the taxpayer was assessed to tax and the total amount of tax payable thereunder amounted to $7,729.08. The taxpayer then appealed to the Income Tax Board of Review (hereinafter called 'the board') pursuant to section 79 of the Ordinance but paid the total amount of the tax as he was required to do under section 86 of the Ordinance. The appeal was heard by the board on various dates in 1966 and 1967 and determined on the 28th January, 1967, when the board allowed the appeal and held that a sum of $19,800 which had been assessed by the comptroller as income was in fact a capital receipt and directed that the assessments be reduced accordingly. The comptroller had therefore, by virtue of the board's decision, received from the taxpayer an overpayment of $5,573.47, a not inconsiderable sum seeing that the original assessment was $7,729.08.

It is necessary to examine the correspondence which ensued.

On the same day, i.e., the 28th January, 1967, the taxpayer's solicitors wrote to the comptroller asking for a re-computation of the amount of tax payable and requesting a cheque for the amount of tax refundable.

On the 2nd February, 1967, the comptroller being dissatisfied with the decision of the board filed a notice of appeal therefrom in the High Court.

On the 8th February, 1967, the taxpayer's solicitors again wrote to the comptroller asking him to reply to their letter of the 28th January by the 13th February.

On the 13th February, 1967, the comptroller wrote to the taxpayer's solicitors that he was making immediate arrangements to refund any tax paid in excess in accordance with the order of the board dated the 28th January, 1967. On

the same day he also wrote another letter to the taxpayer's solicitors that he had proceeded to amend the additional assessments of the 22nd and 28th October, 1965 and enclosed the amended assessment. The comptroller went on to say that as a result of these adjustments to the additional assessments for the year 1965 a refund was due to the taxpayer and this refund would be made during the course of that week on the taxpayer's solicitors' undertaking to retain the refund in their client's account until the outcome of the comptroller's appeal to the High Court.

On the 15th February, 1967, the taxpayer's solicitors wrote to the comptroller asking him to confirm the precise amount of the sum to be refunded. They added that they had no authority to give the required undertaking and that there was no statutory basis for requiring it and demanded an immediate refund.

Then follows some curious correspondence from which it appeared that the comptroller was unable to arrive at the correct figure to be refunded until advised by the taxpayer's solicitors. On the 16th February, 1967, the comptroller thought it was $2,611.48. On the 17th February, the taxpayer's solicitors informed it was $5,573.47. On the 20th February, 1967, the comptroller suffered a further change of heart and thought it was $7,729.08. On the 22nd February, 1967, the taxpayer's solicitors pointed out that the comptroller had still got the figure wrong and reiterated that it was $5,573.47. At the same time and, in my view, not unreasonably, they formally requested a refund of the amount of tax overpaid by the 25th February.

Finally on the 23rd February, 1967, the comptroller agreed with the figure given by the taxpayer's solicitors and confirmed that the refund due to the taxpayer amounted to $5,573.47.

On the 24th February, 1967, the comptroller wrote to the taxpayer's solicitors that he was proceeding to apply to the board for a further order that the tax repayable, namely $5,573.47, should be retained by the comptroller until the outcome of his appeal to the High Court was known. I can only describe this an astonishing misconception of the board's powers and it elicited the short and not surprising reply that in the opinion of the taxpayer's solicitors the board had no jurisdiction whatever to consider an application relating to payment of tax and that a writ would issue forthwith which it duly was.

On the 2nd March, 1967, the comptroller, not surprisingly, informed the taxpayer's solicitors that he was withdrawing his application to the board.

The comptroller then took the point that the writ issued on behalf of the taxpayer was not in accordance with the provisions of the Government Proceedings Ordinance, 1956 as amended by the Government Proceedings (Amendment) Act, 1966.

Correspondence on the subject followed between the taxpayer's solicitors, the Attorney-General and the comptroller on the subject to which I need not refer with the result that the taxpayer found himself in the position of having, as a last resort, to proceed by way of motion for an order of *mandamus* as the comptroller refused and still refuses to cause payment to be made forthwith to the taxpayer of the sum of $5,573.47 in accordance with the provisions of section 93 of the Ordinance.

That section in so far as is material for the present purpose provides as follows:—

"93. (1) If it is proved to the satisfaction of the comptroller that any person for any year of assessment has paid tax, by deduction or otherwise, in excess of the amount payable under the provisions of this Ordinance, such person shall be entitled to have the amount so paid in excess refunded:

Provided that —

(a) every claim for repayment under this section shall be made within six years from the end of the year of assessment to which the claim relates;

(b) nothing in this section shall operate to extend any time limit for appeal or validate any objection or appeal which is otherwise invalid or authorise the revision of any assessment or other matter which has become final and conclusive.

(2) . . . . . .

(3) The comptroller shall certify any amount repayable under this section and shall cause repayment to be made forthwith."

The trial judge took the view that the comptroller was clearly not satisfied that the taxpayer had paid tax in excess of the amount payable as he was required to be under section 93(1) of the Ordinance and further that he had not certified any amount as being repayable under section 93(3) thereof.

This is how he dealt with the matter:—

"In my view the comptroller's two letters of the 13th February, 1967, must be read together. The statement that he was making immediate arrangements to refund any tax paid in excess in accordance with the order of the board was subject to the assessee's solicitors giving an undertaking to retain the refund in their client's account until the outcome of the comptroller's appeal to the High Court. To my mind this plainly indicates that the comptroller was not satisfied that the assessee for the year of assessment 1965 had paid $5,573.47 in excess of the amount payable under the provisions of the Income Tax Ordinance. The comptroller indicated his dissatisfaction with the decision of the board as early as the 2nd February, 1967, when he filed a notice of appeal in the High Court against that decision. The comptroller has not withdrawn the appeal. I accept the comptroller's statement in paragraph 5 of his affidavit of the 11th April, 1967, that he has not stated that he is satisfied that any repayment of tax is due to the assessee. In the circumstances I do not see how the assessee can invoke section 93 of the Income Tax Ordinance to claim a refund. I also accept the comptroller's statement in paragraph 5 of his affidavit that he has not certified any amount as being repayable under section 93 to the assessee. It is true that the

comptroller by his letter of the 23rd February, 1967, confirmed that the refund due to the assessee amounted to $5,573.47. But that confirmation was given subject to the decision of the board being correct. The comptroller is of the opinion that that decision is incorrect. So I cannot regard the comptroller's letter of the 23rd February as a certificate of the amount repayable under section 93. The comptroller is therefore not under any statutory obligation to cause repayment to be made forthwith. In my judgment the assessee's application is misconceived and I accordingly dismiss it with costs."

The error, so it seems to me, with respect, into which the trial judge has fallen is in confusing the amount of tax properly assessable under the Ordinance with the amount of tax properly payable thereunder and in arriving at the conclusion that the pending appeal to the High Court by the comptroller from the decision of the board was in any way relevant to a determination of the question whether the taxpayer had paid tax in excess of the amount properly payable by him.

There is a clear difference between assessment, which is the administrative act of the comptroller and quantifies the exact amount of tax to be charged, and recovery of payment. The former is dealt with in Part XI of the Ordinance, the latter under Part XIII. Payment depends on an assessment as it stands at any given point of time and once an assessment has been amended the original one disappears and the amended assessment takes its place. See *The Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.*[1] where at page 54 Isaacs, J. said:—

"An alteration or addition is not something extraneous to a standing assessment when an alteration or addition is made the assessment henceforth exists as altered or added to and not as previously existing plus independent alteration or addition."

When the board reduced the chargeable income of the taxpayer by the amount of $19,800 his original or standing assessment was altered or amended thereby and accordingly as so altered or amended it became the assessment and the liability to pay depends solely on the assessment as it stands at any given moment.

It is obvious that the comptroller was not satisfied with the board's decision in respect of his assessment but that, in my view, has nothing whatever to do with the refund he is required by law to make as the result of that decision.

It is difficult to see how better it could be proved to the satisfaction of the comptroller that the taxpayer has paid tax in excess of the amount payable under the provision of the Ordinance than by a decision of the board to that effect and lest it be forgotten the board is an institution created by statute for the protection of taxpayers to which they can appeal if dissatisfied with the comptroller's assessment.

To go a stage further, in accordance with the decision of the board, the comptroller issued an amended assessment on the 13th February, 1967 stating the tax payable to be $2,155.61. Once the comptroller issued that amended assessment the taxpayer, unless there was a clerical error apparent on the face of the assessment, had irrefutable evidence for the purposes of section 93 of proof to the satisfaction of the comptroller.

In my judgment the provisions of section 93(1) have clearly been satisfied and as a result section 93(3) comes into play. In pursuance thereof the comptroller has carried out the first part of the duty imposed upon him by that subsection and has certified the amount repayable. That this is so is beyond doubt as in his letter to the taxpayer's solicitors of the 23rd January, 1967, he formally confirms that the refund due to the taxpayer amounts to $5,573.47. It is the second part of the duty under that subsection that he has failed to carry out, namely to cause repayment of the amount so certified to be made forthwith to the taxpayer.

It was argued before us that section 93 of the Ordinance has no application to the facts of the present case and was not designed to cover refunds such as this i.e. as the result of a decision of the board or for that matter of the High Court. It was contended that the section only applied to assessments which have become final and conclusive under section 84 of the Ordinance. But the short answer is that there is nothing in the Ordinance which says so unlike section 241 of the Indian Income Tax Act which gives power to the income tax authorities to withhold a refund in certain cases or section 127 of the East African Income Tax (Management) Act, 1958 which specifically provides that a taxpayer shall only be entitled to a refund of an excess payment under an assessment *as finally determined.* I can find no logical reason whatever for the argument that section 93 must be read with section 84 of the Ordinance or that there is a *lacuna* in the law.

It was said that there was neither a power to refund nor a power to retain under section 93 of the Ordinance as there is in the corresponding Australian and Indian legislation to which we were referred. In my view there is no *lacuna* and no further legislation is required. In any event the court will not so construe a statute as to give rise to a *lacuna* if it can be construed without doing so.

I am unable to see what comfort or assistance the comptroller is able to derive from proviso (b) to subsection 1 of section 93 of the Ordinance. It was inserted, so it appears to me, as a matter of precaution to ensure that by reason of the provisions of section 93 the observance of certain other provisions of the Ordinance specified in the proviso should in no way be impaired.

There is a further matter to which reference must be made and that is in connection with the comptroller's letter to the taxpayer's solicitors

of the 13th February, 1967, to which I have already drawn attention in which he imposed as a condition of the refund to the taxpayer, which the comptroller undertook to make, an undertaking by the taxpayer's solicitors to retain the refund in their client's account. A similar situation arose in the *Commissioner of Income Tax, Bombay Presidency and Aden* v. *The Bombay Trust Corporation, Ltd.*[2] where it was held that the commissioner acted illegally in demanding security as a condition for refunding the tax. The case went to the Privy Council which agreed with the remarks of the Chief Justice in the court below where he commented with some severity upon that part of the order of the commissioner which imposed as a condition of refund that a guarantee should be given by a third person. I have no doubt that those comments apply with equal force to the present case. It seems to me that the comptroller must have known perfectly well that there was no legal justification whatever for imposing such a condition.

The only other matter I desire to mention is the affidavit of the comptroller affirmed on the 11th April, 1967 and in particular paragraph 5 thereof on which the trial judge seems to have relied and which leaves much to be desired. This paragraph is as follows:—

> "5. No claim has been made by the applicant for any repayment of tax under section 93 of the Income Tax Ordinance and as such, I have neither stated that I am satisfied that any repayment of tax is due to the applicant nor have I certified any amount as being repayable under that section to the applicant."

The correspondence throughout to which I have already referred was all signed by one A. S. Verick for comptroller of Income Tax. Mr. Verick is an Assistant Comptroller of Income Tax and by virtue of section 2 of the Ordinance is for the purposes of the exercise, *inter alia*, of powers under section 93 of the Ordinance included in the term comptroller. This being so, paragraph 5 of the comptroller's said affidavit is clearly ambiguous.

The comptroller takes the point both in his affidavit and before us that no claim was made by the taxpayer for any repayment of tax under section 93 that he was neither satisfied that any repayment was due to the taxpayer nor did he certify any amount as being repayable under that section to the taxpayer. This seems to me to be flying in the face of the evidence. In so far as a claim is concerned section 93 does not require one nor is the taxpayer obliged to submit one. In point of fact, however, a claim was made by the taxpayer's letters to the comptroller of the 28th January and 22nd February, 1967.

The comptroller's letter to the taxpayer's solicitors of the 23rd February, 1967 certifies the amount repayable under section 93(3) as clearly and plainly as it is possible to do so and it is quite unnecessary, in my view, for reference to be made to section 93 in express terms or that the word 'certify' should be specifically mentioned.

One cannot but view with considerable concern the course these proceedings have taken. Every conceivable technical ground of objection appears to have been put in the path of the taxpayer to impede his progress in pursuit of his rights which, in the view I take, brooked of no denial. There was even a last minute motion by the comptroller for an order for security for costs of this appeal against the taxpayer which we dismissed summarily on the opening day of the hearing.

The comptroller has been entrusted by the Legislature with wide and far reaching powers, no doubt with very good reason, but it is of paramount importance that they should be exercised with circumspection and within the limits prescribed. If there has been an abuse of these powers it is the duty of the court to interfere and to ensure a strict and proper compliance with the provisions of the Ordinance.

It is all the more surprising therefore to note that despite the comptroller's determined efforts to avoid repayment of the amount of tax paid in excess of what was due by the taxpayer, the comptroller, in the court below, conceded that he might perhaps have no power to retain this excess payment in the light of the decision of the board. In such a case he admitted that the taxpayer might have a remedy but it was not *mandamus*. In the circumstances of this case I find this an astonishing and significant admission. One would have expected, once the comptroller conceded he had no power to retain an excess payment, that he would as a matter of course have taken steps to cause repayment to be made. In any event once legal proceedings were instituted against him by the taxpayer for repayment of the excess payment, one would then have thought that the comptroller would not, as he could only do at the public expense, defend such proceedings but would immediately cause repayment to be made.

It therefore seems to me astonishing that this particular claim for repayment of an excess payment reached the stage of a hearing in court to decide a purely technical point, namely whether *mandamus* was the proper remedy. It was not in dispute as I understood it that *mandamus* will lie against the comptroller if he is under a statutory obligation to perform a duty towards the taxpayer. In the circumstances of the present case there was such a duty imposed upon the comptroller and *mandamus* was, in my view, the only effective and expeditious remedy open to the taxpayer.

For these reasons therefore we allowed the taxpayer's appeal with costs here and below on

the higher scale. We directed that an order of *mandamus* should issue directed to the comptroller compelling him to comply with the provisions of section 93(3) of the Ordinance by causing repayment to be made to the taxpayer of the sum of $5,573.47 being income tax paid by the taxpayer in excess of the amount payable by him under the provisions of the Ordinance.

Wee Chong Jin C.J.: Having had the advantage of reading the judgment of Buttrose J. with which I agree, I need add only a few words of my own.

Following upon the decision of the Income Tax Board of Review and the consequent amended assessment made by the comptroller the position *vis-a-vis* the taxpayer and the comptroller was, in my opinion, crystal clear. The taxpayer had made an excess payment of $5,573.47 to the comptroller and the comptroller had received from the taxpayer an overpayment of $5,573.47.

In these circumstances, unless there is a clear provision in the Ordinance enabling the comptroller to retain the excess payment pending the result of his appeal against the decision of the Board of Review, the taxpayer had a clear right to a refund of the excess payment from the comptroller.

Instead of refunding the excess payment, the comptroller chose to impose a condition precedent to his refunding, namely an undertaking by the taxpayer's solicitors to retain the refund in their client's account until the outcome of his appeal. Clearly the comptroller had no legal right or authority to require such an undertaking and on the facts and the view this court took of the law, an order of *mandamus* was accordingly made.

No adverse criticism could I think have been levelled against the comptroller had he, from the very outset, indicated that there being no express provision dealing with repayment of excess payments in circumstances such as the present one, it was arguable whether or not he was under a clear duty to refund whilst at the same time offering to refund provided the abovementioned undertaking was forthcoming. Instead, from the correspondence that passed and the other steps he took after the board's decision, I cannot but arrive at any conclusion other than that he was determined to retain the excess payment until the outcome of his appeal against the board's decision. In so doing he was not only wrong in law but also unjustified on the merits of the case.

Tan Ah Tah F.J.: I agree with both the judgments which have been delivered.

Appeal allowed.

Solicitors: *Rodyk & Davidson.*

LAU LIAT MENG v. DISCIPLINARY COMMITTEE

[P.C. (Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Upjohn and Sir Hugh Wooding) June 7, 1967]

[Privy Council Appeal No. 28 of 1966]

Advocate and Solicitor — Professional misconduct — Non-disclosure to client of taxed costs already recovered — Disciplinary Committee — Failure to make specific charge against advocate and solicitor in respect of non-disclosure — Finding of grossly improper misconduct — Whether violation of the principles of natural justice — Champertous agreements — Whether court can without hearing evidence act on Disciplinary Committee's findings — Advocates and Solicitors Ordinance (Cap. 188), ss. 25(1) & (2), 26, 27, 28, 29, 30, 49 & 57(b).*

Motor Vehicles (Third-party Risks and Compensation) Ordinance, 1960, s. 17(2),(3).

Evidence — Power of appellate court to hear fresh evidence.

Natural justice — Opportunity to meet charges — Discipline.

The appellant, an advocate and solicitor in Singapore was instructed by a deceased boy's father to claim damages for the death of the boy. The appellant attended the coroner's inquiry and conducted negotiations with the solicitors for the owners of the vehicle involved in the collision which resulted in the boy's death. The claim was, on the 18th January, 1964, settled for $4,000 damages and $500 costs payable by the owners of the vehicle. The $500 was paid to the appellant on the 22nd January, 1964, and he, pursuant to his client's general authority given on the 11th January, 1964, retained the money without paying this sum into his client's account with his bankers. The actual receipt of the $500 was not disclosed to the client. Pursuant to section 17(2) of the Motor Vehicles (Third Party Risks & Compensation) Ordinance, 1960 a party and party bill was taxed at $500. This taxation, which was in respect of the $500 previously paid on the 22nd January, 1964, took place on the 14th April, 1964.

Prior to this, a solicitor and client bill had, on the 11th February 1964, been taxed at $705.50. On the 27th February, 1964, the appellant received from his client a further sum of $700 being agreed costs for his attendance at the coroner's inquiry and in respect of his proposed attendance at the prosecution of the driver of the bus involved in the collision. Of this $700, a sum of $350 was on the 13th April, 1964, returned to the client, the appellant not attending the trial of the driver as his client had failed to give further instructions in this matter.

The appellant appeared before a Disciplinary Committee on two substantive charges of grossly improper conduct. One charge related to the receipt of the $700 and the other to a champertous agreement alleged to have been made by the appellant by which he was to

* The Advocates and Solicitors Ordinance (Cap. 188) was, on February 11, 1967, repealed and replaced by the Legal Profession Act (No. 57 of 1966). For convenience of reference there are set out below the sections of the Ordinance referred to in the judgment together with the corresponding (but not necessarily identical) sections of the Act.

Ordinance	*Act*
s. 25(1) and (2)	s. 87(1) and (2)
s. 26	ss. 89(1), 90
s. 27	s. 89(2)
s. 28	s. 96
s. 29	ss. 100, 101
s. 30	s. 102
s. 49	s. 115
s. 57(b)	s. 111(1)(b)